

*Japan – Measures Affecting the Importation of Apples (WT/DS245)  
Recourse by the United States to Article 21.5 of the DSU*

**Comments of the United States of America  
on the Answers of Japan  
to Additional Questions from the Panel**

February 1, 2005

A. **To both parties:**

Q1. *Please list the information that is provided on export certificates and phytosanitary certificates accompanying exported apples from the U.S. to Japan.*

1. While Japan's answer to the Panel's question explains that item 16 of the phytosanitary certificate is "specifically included in the phytosanitary certificates to meet Japan's current requirements for apple imports," the United States notes that items 1 through 6 are also included on the phytosanitary certificate solely to indicate that the apple fruit have been treated according to Japan's codling moth requirements.

2. As the United States noted in its answer to this question, phytosanitary certificates contain various plant health statements as required by the importing country. Export certificates, on the other hand, address quality issues pursuant to the Export Apple Act.<sup>1</sup>

Q6. *In response to the Panel's question No. 16, Japan has indicated that the various new studies, with the exception of Kimura et al. (2005), were completed by 31 May 2004. The United States has indicated that it was not aware of these studies until Japan's first submission to the Panel in September 2004. Please explain why these studies were not provided to the US to facilitate discussions of Japan's implementation by 30 June 2004. Was the June 2004 PRA provided to the US prior to the end of June deadline for implementation? Please explain.*

3. Japan's answer to the Panel's question does not reconcile with its statement that the Azegami (I) study was completed on November 6, 2003 and the Tsukamoto (I) study on May 31, 2004.<sup>2</sup> According to the completion dates previously presented by Japan, the Azegami (I) study was completed 237 days, and the Tsukamoto (I) study 30 days, prior to expiration of the RPT. In addition, although Japan submitted the Azegami (I) study to the Journal of General Plant Pathology on July 2, 2004, the United States did not receive a copy of the manuscript until encountering it for the first time as an exhibit to Japan's first submission (on October, 12, 2004)

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<sup>1</sup>See, e.g., Answers of the United States of America to Additional Questions from the Panel, January 25, 2005, para. 6.

<sup>2</sup>See Japan's Answer to Panel Question 16(A), November 11, 2004.

– marking another 104 days since the study’s completion.

4. Even if the studies were only in “manuscript” form, the United States is unaware of any reason why Japan could not have shared the results of the studies prior to the expiration of the reasonable period of time (“RPT”) on 30 June 2004. In any event, the “manuscript stage” at which the Azegami (I) study is said to have been on June 30, 2004 must have closely resembled the study’s final form – it was submitted for publication only two days later, on July 2, 2004.<sup>3</sup>

5. Japan’s rationale for why it neither noted the existence nor provided a copy of its PRA to the United States prior to the expiration of the RPT is similarly unfounded. The PRA (*i.e.*, the pre-September PRA) was, according to Japan’s answer, completed on June 15, 2004 – two weeks prior to the expiration of the RPT. Japan states that it “intended” to provide a copy of the PRA to the United States, yet did not do so because “the United States did not request Japan to do so.” It goes without saying that the United States was not in a position to request documents which it had no reason to know existed.

Q7. *Where in Japan’s Detailed Rules (or the Operating Criteria) is there provision that Japan’s inspection of US orchards is to be carried out at the same time as, and conjunction with, the inspection by the US authorities of the orchards at the fruitlet stage.*

6. As noted by the United States in its preliminary ruling request, the Operational Criteria are not part of the measure at issue in this proceeding. Japan has attempted at various stages of the proceeding to insinuate the Operational Criteria into discussions and analyses of its measures on U.S. apple fruit. Repeated references in this proceeding to the Operational Criteria, however, do not make them an integral part of Japan’s measures. The measures presented to the United States and represented to the DSB upon expiration of the RPT as constituting Japan’s revised regime for U.S. apple fruit are contained exclusively in Japan’s revised Detailed Rules, thus these Rules – and not the Operational Criteria – are the measures taken to comply, within the terms of Article 21.5 of the DSU.<sup>4</sup> The Detailed Rules make no statement regarding concurrent inspection of orchards by U.S. and Japanese officials (whereas earlier versions of the Detailed Rules did, in fact, contain such a provision).<sup>5</sup>

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<sup>3</sup>Note that the Journal of General Plant Pathology website lists the date of receipt of the Azegami study as July 2, 2004 (as opposed to the July 4, 2004 date quoted in Japan’s answer), only 2 days after the expiration of the RPT. See Attached Print-out from the Journal of Plant Pathology’s website (Exhibit USA-30).

<sup>4</sup>See U.S. Preliminary Ruling Request (September 27, 2004), paras. 3-7.

<sup>5</sup>See, *e.g.*, Detailed Rules (April 1, 1997), § 1(4), clearly stating that the confirmatory inspection to be conducted by Japan was to be “carried out *at the same time* with the inspection of the American authorities for the designation of the orchards prior to harvest.”